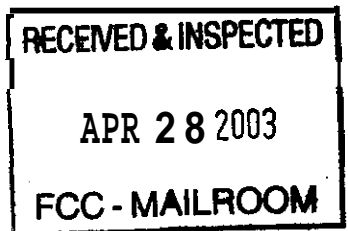




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In the Matter of: Request for Review by Navajo Education Technology Consortium
of a Decision of Universal Service Administrator

April 17, 2003

Ms. Magalie Roman Salas
Secretary
Office of the Secretary
Federal Communications Commission
445 -12th Street, S.W., Rm TW-204B
Washington, D.C. 20554

Re: **CC Docket no. 96-45, and CC Docket no. 97- 21**
FCC Form 471 Application Number: 306050
FRNs: 864053,864144,86219
Funding Year 2002: 07/01/2002 - 06/30/2003
Billed Entity Number: 226513

Enclosed are the original and four (4) copies of the Appeal. An extra copy is also enclosed. Please time stamp the extra copy and return it to me in the enclosed self addressed-stamped envelope.

The Federal Communications Commission (FCC) **has** stated that:

"Our government-to-government relationship with tribal authorities make us partners in the quest to bring access to all modern communications to Indian Country. We share a common goal: to increase the availability of telecommunications services on tribal lands. While penetration rates have increased in the last decade, the chasm between penetration rates on tribal lands and the national average must be closed. Current penetration rates - which are below 50% of the population in some tribal areas - are unacceptable. Spectrum-based services provide an ideal opportunity to close this gap." March 5, 2003 Media Release, "Improving Access to Telecom Services in Indian Country", http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-231750A1.doc

However, as demonstrated by this Appeal, what the FCC states and what it does in terms of funding for telecommunications **via** its Schools and Libraries Division (SLD) of the USAC, are two entirely different matters.

The SLD sent a Funding Commitment Decision Letter (FCDL) to the Navajo Education Technology Consortium (NETC) denying funding for Funding Year 2002, 07/01/2002 – 06/30/2003. In the FCDL, the SLD instructed NETC to Appeal to the FCC if it disagreed with the FCDL.

Also, in accordance with the rules of the FCC, **we are requesting that a decision be issued within ninety-days (90) or less of this Appeal reversing the decision of the SLD, which denies funding to NETC.** See, Subpart I-Review of Decision Issued by Administrator, Section 54.724, 47 Code of Federal Regulations, Ch 1 (10-1-02 Edition). It is the opinion of the Navajo Education Technology Consortium that the action and decision by the SLD is unfair, unreasonable and not supported by the documents provided to the SLD by NETC.*

The SLD denied funding because:

“Services for which funding sought not defined when vendor selected; price of services not a factor in vendor selection per customer agreement; prices of services set after vendor selection.”**

* The documents are attached to this Appeal and were either provided to the **SLD** during a Selective Review, or were available to the **SLD via** NETC’s filings with the **SLD**. The documents and records are included here to expedite the review process since the education of approximately 50,000 Navajo children is at stake.

** George McDonald, SLD, stated to me, Karen Leshner, that the reason for the NETC’s denial is that NETC’s 470 “appeared similar” to other 470s. However,

The SLD's denial of the NETC's 471 Application is categorized as a) Services for which funding sought not defined when vendor selected; b) price of services not a factor in vendor selection per customer agreement; c) prices of services set after vendor selection; and, d) 30% of FRN 864144 is for ineligible PIX-SO. **This is the basis of NETC's Appeal.**

NETC will discuss each issue as stated below and will support its position with documentation. This documentation was previously provided to the SLD but was ignored.

(i) Services for which funding sought was in fact defined before vendors were selected.

NETC's 470 is also "similar" to a sample 470 found at <http://www.e-ratecentral.com/> Document #1. It is an application "tip" published for all to see and use. The "tip" states "[I]n Block 2, be as broad and inclusive as possible in summarizing needs or service requested." Mr. McDonald's statement is confusing and does not seem fair and reasonable. As NETC sets forth in this Appeal, the SLD's process was followed. NETC's starting point for the 470 was the SLD's Eligible Services List. The List is at: <http://www.sl.universalservice.org/reference/eligible.asp> NETC's 470 includes precisely what is set forth in the SLD's Eligible Services List. NETC's 470 is nothing more than a reflection of NETC's needs based on the Eligible Services List. Since the Eligible Services List is based on an SLD document, it is unfair and unreasonable for the SLD to now state that NETC's 470 is flawed. NETC's reason for using the Eligible Services List is to prevent the SLD from saying during the **PIA** process that funding for the requested services was not included in its 470. Of course, NETC fulfilled the SLD "bid" requirement "[b]y completing and posting" its 470. The FCC made this clear in a decision - **CC Docket No. 96-45, CC Docket No. 97-21, File No. SLD - 130114, rel. October 26, 2000** <http://www.e-ratecentral.com/> NETC's 470 described planned service requirements, as well as other information regarding the applicant.

NETC received Letters of Agency (LOA) from members of the Consortium. Document #2 (includes summary & actual LOAs). Each LOA not only authorized the school to participate in the Consortium, but set forth the scope of each project (the services for which funding was required). That is, each LOA set forth the services needed: Video (distance learning), Technical Support (maintenance), Infrastructure Upgrades (to support video/other needs), Internet Access, Telecommunications, Cabling. See, Document #2. Each Consortium member set forth the individual buildings included in these projects to determine services required by each member for 471 Application purposes. Document #3.

NETC determined the size of the project through an “E-Rate 5 Planning” process. The Consortium’s E-Rate 5 Planning process **further** defined the scope of E-Rate for Funding Year 07/01/2002-06/30/2003. This Planning process set forth the schools, by building, that would require E-Rate funds. NETC prepared a “Needs Assessment Survey” or inventory to assist the Consortium in understanding the needs of the Consortium members. Document #4. (The Needs Assessment played a role in overall network planning for the Consortium, not just E-Rate.)

NETC used the state approved Gallup McKinley County School’s, a NETC member, “Educational Technology Plan” as a “model” to determine the parameters of the NETC educational objectives. Document #5. Thus, Document #4 set forth goals and objectives of the Consortium that included the “needs assessment”.

After the scope or needs assessment, of the project was determined and services were defined, the Consortium posted its FCC Form 470 on the SLD's web site as required by the Regulations of the Federal Communications Commission (FCC). Document #6. The 470 clearly defined the services **using the language from the SLD's Eligible Services List** for which the Consortium wanted proposals and prices from vendors. The Instructions for completing the FCC Form 470, Year **5**, states that a "summary description of needs and services" is required. See, 470 Instructions, pg. 9. Document #7. The Consortium's posted FCC Form 470 complied in all respects with the 470 Instructions and SLD pronouncements. Specifically, the 470 relates to services for "universal service discounts" and the "competitive bidding process". See, Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form (FCC Form 470), pg.2, "Introduction". Document #8. Additionally, SLD instructional material states that the Form 470 is used by Applicants to begin the competitive bidding process; it indicates the services being sought. **See**, excerpt from Training Workshop material. Document #9. The Consortia's 470 does in fact list the services in detail for which the Consortia was seeking "universal service discounts". See, attached 470. The SLD "certified this 470 as complying with FCC/SLD regulations. See, Attached certification. Document #10. The SLD posted the 470 on its web site for all potential vendors to see; it specified services hardware for which USF discounts were requested. ANY vendor could respond to this, and they did. See list below. This is the purpose of the 28 day posting of the 470. The FCC addressed this very issue in ***CC docket No. 96-45, FCC 97-157, Report & Order Federal-State Joint Board on Universal***

Service, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997)

(Universal Service Order) This decision is found at <http://www.e-ratecentral.com/>

If there was a problem with the District's 471 Application, the SLD should have utilized its much publicized "Problem Resolution" process. Document #11. The SLD did not follow its own process.

Since the services were in fact defined, twelve (12) potential vendors responded to the Consortium's posted **470**. Document #12. Those responders included:

IKON Office Solutions

Thruput Solutions, Inc.

Bizw Technologies

CLH International Inc.

Gaggle

Teradon Industries, Inc.

Solutions Integrators

TAMSCO Telecommunications

TRI

IBM

NAS/Williams

Ames Business & Learning Environments, Inc.

The NETC Consortium provided each vendor with:

Educational Goals of the project

NETC E-Rate project vision and design

Size of the Consortium and states covered

Name, location of participating districts, contact information

Student enrollment

Geographic challenges

Contact information for submitting proposals.

Document #13.

(ii) Price for services were a factor in vendor selection.

Price was a factor for the NETC Consortium. Document #14.

Document #14 states that the “criteria to be used to select a vendor [was] 1) price

2) past experience, 3) vendor capability, 4) proposed solution.”

The Consortium Executive Committee reviewed each proposal and made a selection based on the aforementioned criteria. Document #15. The entire Consortium then ratified the decision of the NETC Executive Committee.

The only documentation available, and that was actually provided to the SLD, states that price was a primary factor in the selection of a vendor.

The FCC addressed this issue too stating:

“First, ... we note that the Joint Board intentionally did not recommend that the Commission require schools and libraries to select the lowest bids offered but rather recommended that the [FCC] permit schools and libraries “maximum flexibility” to take service quality into account and to choose the offering or offerings that meets their needs “most effectively and efficiently,”⁽¹²⁴⁸⁾ where this is consistent with other procurement rules under which they are obligated to **operate**.⁽¹²⁴⁹⁾ We concur with this policy, noting only that price should be the primary factor in selecting a bid. When it specifically addressed this issue in the context of Internet access, the Joint Board only recommended that the Commission **require** schools and libraries to select the most cost-effective supplier of **access**.⁽¹²⁵⁰⁾ By way of example, we also note that the federal procurement regulations (which are inapplicable here) specify that in addition to price, federal contract administrators may take into account factors including the following: prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.⁽¹²⁵¹⁾ We find that these factors form a reasonable basis on which to evaluate whether an offering is cost-effective.” *See, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997) (Universal Service Order)*. (http://w.fcc.gov/wcb/universal_service/fcc97157/97157.html) para 481. [Emphasis added]; see also, FCC-00-1 67A1.pdf

NETC complied with this rule from the FCC.

And, as the FCC also stated:

“Given the varying **needs** and preferences of different schools and libraries and the relative advantages and disadvantages of different technologies, we agree with the Joint Board that individual schools and libraries are in the best position to evaluate the relative costs and benefits of different services and **technologies**.⁽¹¹¹⁷⁾ We also agree with the Ohio PUC and DOE that our actions should not disadvantage schools and libraries in states that have already aggressively invested in telecommunications technologies in their state schools and **libraries**.⁽¹¹¹⁸⁾ Because we will require schools and libraries to pay a portion of the costs of the services they select.⁽¹¹¹⁹⁾ we agree with the Joint Board that, as recognized by most commenters,⁽¹¹²⁰⁾ allowing schools...to choose the services for which they will receive discounts is most likely to maximize the value to them of universal service support and to minimize inefficient uses of services.⁽¹¹²¹⁾” [Emphases added] *Id.*, para 432

The Consortium has no record or evidence that a “customer agreement” was involved in any way with the terms, conditions or prices in the vendor selection process.

(iii) Prices of services were set prior **to** vendor selection.

NETC documentation clearly states that the vendors responding to the FCC Form 470 submitted proposals, Document #16, and the winning vendors were selected in accordance the following criteria: 1) price, 2) past experience, 3) vendor capability, 4) proposed solution. Document # 14.

The following vendors submitted a quote (“price”) prior to vendor selection:

Citizens

NAS/Williams Communications

TAMSCO

IBM

Document #16.

However, based on the Consortium’s criteria, IBM was selected.

And, for purposes of this Appeal, there is no need to deal with Navajo Communications since they are a telephone company, a sole source provider.

The Western States Contracting Alliance (WSCA) played a role in the Consortium’s process.

NETC was required to select a vendor (s) based on state and Consortium procurement regulations. NETC and each of its member districts must follow state procurement policies, which includes using a state procurement contract such **as** WSCA. Therefore, the Consortium used WSCA **as** a state contract for technology service and equipment.

IBM is listed on WSCA. Document #17 reflects pertinent portions of WSCA. WSCA can be found at: <http://www.aboutwsca.org> .

(iv) The SLD's 30% rule was not applied correctly.

The SLD concludes that the PIX hardware, and associated services, is ineligible for USF purposes since it is more than 30% of the FRN. This is not accurate.

The PIX percentage is actually 24%, computed as follows:

PIX Total	minus District's 10%	PIX Total
\$2,117,841.83	\$575,758.00	\$1,542,083.83

Based on this illustration, NETC and the vendor can "ensure that the SLD is not invoiced for the ineligible items." See,

<http://www.sl.universalservice.org/reference/esr.asp>

This computation is fair and agrees with the FCC's declaration in *Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, FCC 97-157 (rel. May 8, 1997) (Universal Service Order)* Document #18. There, the FCC clearly stated that:

"individual schools...are in the best position to evaluate the relative costs and benefits of different services and **technologies**.⁽¹¹¹⁷⁾ We also agree with the Ohio PUC and DOE that our actions should not disadvantage schools and libraries in states that have already aggressively invested in telecommunications technologies in their state schools and libraries.⁽¹¹¹⁸⁾ ...we will **require** schools and libraries to pay a portion of the costs of the services they select,⁽¹¹¹⁹⁾ ..."

This SLD's procedure, CC docket No. 96-45, CC Docket No. 97-21, File No. SLD-168883, rel. December 20, 2001, para 38, is unreasonable in light of the Telecommunications Act of 1996. The 30% SLD's practice may be **summarized** as follows: 'This '30% Rule' is used for processing efficiency and for administration of a

program for which there is greater demand than there are funds available.” Document #19.

While the reasonable administration of the USF program is a laudable purpose, neither the SLD nor the FCC, should use “processing efficiency” to disenfranchise needy school children, here approximately 50,000 Native American school children. The principle of “processing efficiency” was unreasonable as applied in this instance; the calculation was inaccurate, based on the facts of the Consortium. How can there be any greater demand for USF than a School District that represents school children that are at the 90% (if not 100%) free and reduced level? Does “processing efficiency” override need?***

Georee McDonald and the SLD obviously either did not read or believe anything that NETC provided during the Selective Review or PIA process that has taken some fifteen (15) months. The manner in which the SLD reviewed NETC’s documentation and the excessive time to review the NETC 471 is unreasonable and has cost the childrens’ education. time and funding.

The SLD should have authorized funding for this Application, and to not do so was patently unfair and unreasonable.

***The FCC has stated that it “ recognizes that the telecommunications penetration rate on many tribal lands falls far below the national average. We have taken a series of steps, through regulatory action, consumer information and tribal outreach, to address the lack of telecommunications deployment and subscribership throughout Indian Country. Our Commission is working hard to promote the availability of telecommunications services to individuals on tribal lands. We hope you will find our Tribal pages to be a valuable resource.” <http://www.fcc.gov/indians/> Theoretically, the FCC’s initiative includes USF funding for NETC schools. The SLD’s action in unreasonably and arbitrarily denying NETC’s 471 is out of step with the FCC’s initiative.

NETC is Requesting the Following Action by the FCC:

- (a) Within 90 days or less Order funding for the serviceshardware as requested in the Consortium's 471 Application, specifically FRNs 864053,864144,86219;**
- (b) Set aside funds to totally fund the NETC Consortium's request.**

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Lesh', followed by a horizontal line.

Karen Lesh
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Phone: (505) 722-7711 x 51230
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Cc: Congressman: ~~Rep.~~ Renzi
Senators: Bingaman, Domenici, Kyl, and John McCain